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No. 88-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN O'REILLY, *et al.*,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 2, 1988

RULE 28.1 LIST

Respondent The New York Times Company has no parent company. Respondent's subsidiaries (other than wholly owned subsidiaries) and affiliates are Northern SC Paper Corporation, Spruce Falls Power & Paper Company, Ltd., Donohue Malbaie Inc., and Gaspesia Pulp & Paper Company Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent The New York Times Company ("The Times") respectfully requests that this Court deny the petition for a writ of certiorari.

The decision below affirmed the grant of summary judgment to a newspaper defendant in a libel case after extensive discovery. Both the unanimous panel of the Court of Appeals for the Second Circuit and the District Court applied settled principles of libel law and well-established standards for the grant of summary judgment to the particular facts of this case. The courts below found that each of the petitioners were limited purpose public figures under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The courts below also found that there was no evidence of actual malice, much less clear and convincing evidence, which petitioners are required to show under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The petition raises no serious challenge to the careful reasoning of the Court of Appeals or the District Court. There is no reason for review by this Court.

COUNTERSTATEMENT OF THE CASE

Instead of a statement of the case, petitioners provide an unsupportable diatribe devoid of references to the record. We therefore set forth below the undisputed facts relevant to this petition, incorporating the District Court's meticulous findings and the Court of Appeals' affirmance of such findings.

A. Petitioners' History and Public Figure Status.

Petitioner Contemporary Mission, Inc. ("CMI") and its members are a self-styled religious group who make "religious communication [their] mission, apostolate and profession." (App. at 34a)* The four individual petitioners are the sole officers and directors of CMI and have been members of CMI since its incorporation in 1968. (*Id.*)

In the late 1960s, several members of CMI "formed a nationally known folk-rock group called The Mission Singers." (App. at 9a, 34a) They produced eighteen record albums, gave more than 200 concerts in over thirty-eight states, and appeared on many television and radio shows, including The Ed Sullivan Show, The Mike Douglas Show and The Joey Bishop Show. "Virgin," a rock-opera composed by petitioner O'Reilly, sold 20,000 copies. (App. at 9a-10a, 37a) Petitioners also published a syndicated column in over fifty newspapers for two years and published numerous books and articles on contemporary religious life. (App. at 10a, 37a-38a) Since their rise to prominence, CMI and the four individual petitioners have been the subject of extensive controversy concerning their religious status and other activities.

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* The appendix to the petition is cited as "App.", the petition as "Pet.", and the Joint Appendix in the Court of Appeals as "JA___".

(1) *Petitioners' Religious Controversies.* In 1968, when petitioners left the Montfort Fathers in St. Louis in a dispute over seminary training, their departure was "publicized by nationwide and worldwide news wire services" as a result, according to CMI, of "the fame and popularity" of the group's musical efforts. (App. at 10a, 35a) Three of the four individual petitioners had not yet been ordained, and over the next three years, they contacted approximately thirty bishops seeking one who would ordain them. In 1971, Bishop Peter Sarpong of Ghana ordained the three priests in Cromwell, Connecticut. (App. at 10a)

The ordinations provoked extensive public controversy, including allegations and counter-allegations by John Cardinal Carberry and other church officials in St. Louis, where petitioners lived, and by the petitioners. (App. at 10a, 36a) For example, an Archdiocesan newspaper published allegations that documents submitted in support of the ordinations had been forged. The disputes were widely reported by the press. Over 200 news articles about petitioners from more than sixty different publications located in over fifteen different states were submitted to the District Court by The Times. (App. at 10a)

At the time of these disputes, petitioners "openly availed themselves of the media, issuing press releases, making public statements and addressing 'open letters' to Cardinal Carberry of St. Louis." (App. at 10a-11a) Petitioners' "open letter" to Cardinal Carberry illustrated the public nature of the controversy:

> Thank you for doing so much recently for us members of the Contemporary Mission. Thanks to you, we have now become celebrities, almost household words. All the publicity you've given us—free of charge!—has helped our group immensely. We've been on so many radio talk shows, we've done so many television interviews in depth, that we can no longer keep track of it all. . . .
>
> We would also like to thank you for the thousands of dollars of free publicity you gave us in three issues of your house organ, the St. Louis Review. . . .

> Your little hoax about the allegedly forged letters was priceless. You attempted to implicate us in the forgery, but let's be honest: it seems more probable that *you* either fabricated those letters or else intimidated the authors enough so they would deny them. (App. at 11a)

(2) *Petitioners' Mail Order Business and Troubles with Government Agencies.* Petitioners have also engaged in an extensive nationwide mail order business, which has brought them into conflict with various governmental agencies. (App. at 15a, 38a) As the Court of Appeals noted, petitioners "have not been shy in seeking public attention through their business activities." (App. at 15a) Between 1976 and 1980, CMI mailed over twelve million solicitations for its various mail order products. (App. at 15a, 38a) The products themselves—including "The 'Living' Cross," "The Edgar Cayce Handbook for Health Through Drugless Therapy," "Young & Firm Reducing Bath," and the "Guaranteed Tax Plan 1977"—"by their very nature were certain to attract a degree of public attention." (App. at 15a)

Petitioners' business activities brought them "under the scrutiny of several state and federal governmental agencies, which received hundreds of complaints about Contemporary Mission"; additionally, CMI "has been involved in numerous lawsuits concerning its mail-order business." (App. at 15a) Several of CMI's products were removed from the market by the United States Postal Service pursuant to 39 U.S.C. § 3005, which forbids "obtaining money or property through the mail by means of false representations." (App. at 39a) After the Postal Service revoked CMI's non-profit mailing permit in 1980, CMI sued the Postal Service officials for alleged violations of its constitutional rights. The Court of Appeals for the Second Circuit affirmed the dismissal of that action, stating that CMI's lawsuit was "frivolous" and that its claims were "specious" and intended to "intimidate postal officials." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 105, 106, 107 (2d Cir. 1981).

In September 1979, the Internal Revenue Service ruled that CMI was not tax-exempt. (JA 521, 715) The IRS found that CMI "serves exempt religious purposes no more than would a random distribution of 'self-improvement' selections available at an ordinary book store." In addition, the IRS found that CMI's "accumulation of funds (house, sizable bank accounts, automobiles, stock investment accounts, boat, etc.) is also evidence of a substantial, non-exempt, commercial purpose" and the "nature of the checks drawn" on its accounts is evidence that members were "free to make personal use" of CMI's earnings. (JA 719-20)

CMI's business practices were also investigated by the Bridgeport Better Business Bureau, the Westport Chamber of Commerce and the Westport Police Department. (App. at 38a) In February 1979, the Connecticut Department of Consumer Protection issued an administrative complaint against CMI charging that it had "accepted mail orders and payments for its merchandise and then failed to deliver either the ordered merchandise or refunds within a reasonable period of time." (App. at 38a-39a) CMI ultimately consented to a cease and desist order in which it agreed to stop the challenged practices. (App. at 39a)

B. The Article.

This petition arises from the publication in the November 1, 1980 edition of *The New York Times* of an article entitled "Westport Priests Beset by Church and U.S. on Status" (the "Article"). (JA 765) The Article concerned petitioners, their history and their misfortunes. The Article was based upon the extensive research of an experienced reporter. That research extended over a two-month period and included interviews with more than seventy persons, including three of the petitioners and their counsel, and a review of voluminous court records and clippings about the petitioners. (App. at 20a) The Article was edited by the regional and deputy regional editors, who together had over thirty years experience as journalists. The Article was also reviewed by The Times' religion editor and by

an attorney in The Times' legal department because of CMI's litigiousness. (*Id.*)

Petitioners challenged fourteen separate statements in the Article, which are set out in the Court of Appeals decision. (App. at 3a-6a) Both the Court of Appeals and the District Court painstakingly analyzed each of the fourteen statements that petitioners challenged. After determining that each of the petitioners were limited purpose public figures for the purposes of the statements in the Article, the lower courts concluded that petitioners had failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence with respect to any of the challenged statements. (App. at 30a, 104a, 108a)

C. Proceedings Below.

On November 20, 1980, petitioners filed their original complaint challenging three statements in the Article. (App. at 31a-32a) After two amendments to the complaint, petitioners ultimately challenged fourteen statements. (App. at 3a) Extensive discovery was pursued. (App. at 18a) The Times responded to petitioners' interrogatories and document requests, producing over 1,000 pages of documents, including the reporter's research file. Petitioners' initial deposition of the reporter lasted for five days. (JA 1086-87) Petitioners subsequently continued the deposition of The Times' reporter and also deposed three editors for a total of nine additional days. (JA 1089)

On November 12, 1982, The Times moved for dismissal and for summary judgment as to each of the fourteen claims contained in the second amended complaint. (JA 258-1041) Petitioners sought additional discovery, but the District Court denied petitioners' request, except as to discovery for which petitioners could demonstrate a need pursuant to Federal Rule of Civil Procedure 56(f). (App. at 33a-34a) The District Court subsequently heard oral argument over two days and, in a thorough and well-reasoned Memorandum Order, granted summary judgment to The Times dismissing all of petitioners' claims. (App. at 31a-111a) The Court also denied peti-

tioners' request for still more discovery pursuant to Rule 56(f). (App. at 95a-99a) After petitioners appealed, the Court of Appeals for the Second Circuit, in a thirty-page opinion, affirmed the District Court judgment dismissing the complaint. (JA 1a-30a) This petition followed.

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH SETTLED LAW AND PRESENTS NO REASON FOR THIS COURT'S REVIEW.

The Court of Appeals correctly held that the District Court properly granted summary judgment because petitioners are limited purpose public figures and they could not establish by clear and convincing evidence that The Times knew the statements in the Article were false or entertained serious doubts about their truth.* Both courts correctly applied the well-established standard for public figures set out in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and properly determined that petitioners had not shown clear and convincing evidence of actual malice, as required by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In their questions presented to this Court, petitioners fail to raise any reason for this Court's review. Petitioners do not allege, nor could they, the existence of a conflict between the decision of the Court of Appeals and a decision of this Court or some other court. Nor do petitioners raise any important constitutional or federal jurisdictional issues. Petitioners merely contend that the District Court and the unanimous panel of the

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* The District Court correctly held that many of the challenged statements were not actionable for the additional reasons that they were not defamatory or not false or both. (App. at 6a, 56a-69a) Moreover, many statements in the Article are not actionable because they are privileged, for example, as opinion or a fair and true report. Petitioners appear to seek review of whether the statements were privileged, but neither the Court of Appeals nor the District Court reached the additional bases for protection grounded in privilege because both found that there was insufficient evidence of actual malice with respect to each of the statements.

Court of Appeals erred in applying settled legal principles to the particular facts of this case. Petitioners' own questions show that the case does not warrant review by this Court. In any event, the courts below accurately applied this Court's precedents to the particular facts of this case.

A. The Lower Courts Correctly Held That Petitioners Were Limited Purpose Public Figures.

Both the Court of Appeals and the District Court held that, under *Gertz*, petitioners were limited purpose public figures with respect to statements dealing with the religious controversy surrounding petitioners' status as priests and with respect to the business controversy surrounding CMI's mail order business. (App. at 7a-16a, 69a-92a) Because petitioners were found to be public figures, they had to show by clear and convincing evidence that The Times published the Article with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). (App. at 16a, 51a) Both courts properly followed *Gertz* by examining the nature of the controversy and the petitioners' participation in the controversy.

Petitioners claim that they were not limited purpose public figures because they did not voluntarily inject themselves into the religious and business controversies. (Pet. at 27) The undisputed record evidence, however, showed that petitioners had "openly availed themselves of the media, issuing press releases, making public statements and addressing 'open letters' " in connection with the religious controversy, (App. at 10a-11a) and that they "invited public attention and comment by thrusting themselves into the forefront of the religious controversy . . . ." (App. at 14a)

The lower courts also held that petitioners' business controversy was "necessarily intertwined with the religious controversy," because petitioners "avowedly carried on their business activities in furtherance of their religious commitments . . . ." (App. at 14a, 92a) Moreover, petitioners sought "public attention" through their extensive business activities. (App. at 15a)

Other courts of appeals have held on similar facts that individuals were limited purpose public figures. *E.g., National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983) (foundation was a public figure because it thrust itself into the public eye through massive solicitation efforts and also through the claims and comments it made in the solicitations); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3rd Cir. 1980) (company voluntarily injected itself into a public controversy through the intensive and misleading advertising of its product, the sale of which led to numerous consumer complaints). (App. at 15a)

Petitioners claim that the lower courts did not distinguish between the corporation CMI and the individual petitioners and that there was no demonstration that "each plaintiff voluntarily injected himself" into a controversy. (Pet. at 18, 27) However, petitioners were "the sole officers and directors of Contemporary Mission and they have been members of Contemporary Mission since its incorporation in 1968." (App. at 16a) Although CMI was "technically a legally separate entity," the District Court found it "undeniably true that the individual [petitioners] controlled Contemporary Mission, Inc., determined its policies and were responsible for its actions, and that Contemporary Mission acted only through them." (App. at 61a-62a) Moreover, the Court of Appeals found "sufficient undisputed evidence in the record to establish that each of the priests participated in efforts to gain media attention for Contemporary Mission and the member priests in the early 1970's and that each bore responsibility for the business activities of Contemporary Mission." (App. at 16a)

Petitioners also argue that since the bulk of the events with respect to the religious controversy occurred in the early 1970's, this subject was no longer newsworthy and therefore did not "constitute a continuing controversy." (Pet. at 30) However, as the Court of Appeals recognized, petitioners' assertion is "largely belied by the fact they continued to thrust themselves into the public eye through the conduct of Contemporary Mission's business activities and have been involved in at least 35

other lawsuits since 1974, including several before this court . . . ." (App. at 12a) Moreover, the Court of Appeals noted that "the passage of time will not necessarily change an individual's status as a public figure" (App. at 12a), a holding entirely consistent with appellate precedent. *E.g.*, *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1235-36 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1256-57 (5th Cir. 1980) (involving a general purpose public figure), *cert. denied*, 452 U.S. 962 (1981); *see also Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

B. The Lower Courts Correctly Held That There Was No Evidence To Support A Finding Of Actual Malice.

The Court of Appeals correctly applied *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), to the facts of this case in holding that summary judgment was appropriate because petitioners "failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence." (App. at 30a, 103a) Indeed, the District Court, which rendered its decision prior to the decision in *Anderson*, found that petitioners had not offered "a scintilla of evidence" that The Times published any of the statements with actual malice. (App. at 103a)

Petitioners could not show that The Times ever harbored any doubts as to the accuracy of any of the statements in the Article. (App. at 103a) The Times had reliable sources for each of the statements, and neither the reporter nor her editors ever entertained any doubts, much less serious doubts, about the truthfulness of any of the statements. Petitioners could not provide any evidence of actual doubts, let alone clear and convincing evidence of such doubts. (App. at 20a)

In place of such evidence, petitioners offered only conclusory allegations. Petitioners claimed that The Times and its reporter sought to "blacken" and "wreck" the reputation of each peti-

tioner in this action. (App. at 100a) As the Court of Appeals stated, "[s]uch bare assertions of ill will are not sufficient to establish a triable issue of actual malice." (App. at 20a (citing *Old Dominion Branch v. Austin*, 418 U.S. 264, 281-82 (1974))) Petitioners also contended that the reporter ignored their purported denials and refused to adopt their version of the facts. The District Court correctly pointed out that "[p]ublication in the face of a denial by [petitioners] does not demonstrate actual malice." (Pet. at 101a (citing *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)) As the Court of Appeals and the District Court held, petitioners utterly failed to make the requisite evidentiary showing.

C. The Lower Courts Correctly Held That Petitioners Were Not Entitled to Additional Discovery.

Petitioners also suggest that summary judgment should have been refused in order to allow them still more discovery under Fed. R. Civ. P. 56(f). (Pet. at 1) In light of the extensive discovery conducted by petitioners, the Court of Appeals correctly held that "the district court was well within its discretion in denying [petitioners'] request for additional discovery under Rule 56(f)." (Pet. at 18a-19a, 95a-99a) The Times produced a huge volume of documents, including the reporter's research file and notes from certain conversations related to the Article. (App. at 18a) Petitioners deposed the reporter for eight days and deposed three other Times employees. (*Id.*) Two deadlines for various discovery had already passed. The District Court was well within its discretion in refusing to allow still further discovery. *See Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 928 (2d Cir. 1985).

* * * *

The lower courts applied well-settled legal standards to the particular facts of this case and correctly concluded that summary judgment was warranted. The Court of Appeals properly affirmed the District Court's findings that petitioners are limited purpose public figures and that they "have not offered a scintilla of evidence" that The Times knew the statements in the

Article were false or had serious doubts about their truth. (App. at 17a, 30a, 103a)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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